No. 20442

United States Court of Appeals

For the Ninth Circuit

ANTHONY G. NOTARAS, *Appellant*,

vs.

F. C. RAMON and JANE DOE RAMON, his wife; ARTHUR DROVETTO and JANE DOE DROVETTO, his wife; DONALD F. HANSON and JANE DOE HANSON, his wife; and DONALD KOBLE and JANE DOE KOBLE, his wife, and the respective marital communities formed by each married defendant, *Respondents*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Appellant accepts appellees' Statement of Pleadings and Facts and appellees' Counterstatement of the Case (Appellees' Br. pp. 1-6). There are, in any event, no controverted facts on this appeal, nor were there at the time of trial.

On page 7 of appellees' brief, under Argument of Appellees, appears mis-statement of appellant's position. It is undoubtedly unintentional.

Appellant assigned error to all Findings of Fact and Conclusions of Law which held the appellees' conduct to be lawful, reasonable, or justified. (Appellant's Br. pp.4-5). At page 6 of appellant's brief, it is stated:

> "Herein, all specifications of error will be argued together, insofar as they relate to the law of the case."

Therefore, the statement by appellees (Appellees' Br. p. 7) that the specifications of error are not supported by argument or citation of authority, or that Finding of Fact VII is uncontroverted, simply is not true. Appellant *did* specify error to the questioned findings, *did* support such specifications of error by argument and citation of authority (Appellant's Br. pp. 6-18), and Finding of Fact XII (Tr. 19) *is* controverted.

ARGUMENT IN REPLY TO APPELLEES

Appellees seem to take the position that the Supreme Court of the State of Washington did not mean what it said in the only two cases which specifically considered unlawful detention *in jail* by law enforcement authorities. *Housman v. Byrne*, 9 Wn.2d 560, 115 P.2d 673 (1941); *Ulvestad v. Dolphin*, 152 Wash. 580, 278 Pac. 681 (1929).

No clearer exposition of the vice of appellees' conduct toward appellant Notaras could be found, than in the quotation from *Housman* set forth by appellees at page 9 of their brief.

> "There are no facts before us which show any reason why the appellant was detained for the period of time that he was without being taken

> before a committee magistrate. There being no facts herein, the question is purely one of law. We are of the view that, without any showing of a necessity of detaining him for that period of time, the detention was unreasonable."

If appellees are to contend that their detention of Notaras was justified by circumstances requiring such detention prior to charge, what is their justification?

It will be noted that both appellee Ramon and his "expert" witness Booth testified that their follow-up investigation could have been made with appellant out on bail (Br. of Appellant, p. 9; St. 109, St. 134). No arresting officer changed his story (St. 112); no testimony established that appellant gave a false alibit or conflicting statements (St. 112). The eye-witness identification of appellant did not change (St. 60-61). While it is true that the theft victims were not positive that the police had arrested the correct person (St. 62-63), this does not amount to a justification for holding appellant in custody, without charge or bail, while the police confirm their witnesses. Since probable cause was established for the initial arrest, appellees had no reason to fear false arrest suit or consequences.

It will be noted that appellees' "expert" testified that frequently possible inconsistencies must be faced and resolved, and that one other reason to detain a suspect in custody is to prevent him from destroying possible evidence (St. 122). There is no evidence, testimony, inference or innuendo from any of appellees' witnesses that such was necessary with respect to appellant Notaras. Actually, all that the witness Booth did testify to as necessary in this case was that "reasonable time

for investigation should be allowed". (St. 128.) *He did not testify that the suspect must be in custody to do this investigation.* (It must be remembered that all of Booth's testimony came in over appellant's objection as irrelevant (St. 117; 121.) Booth actually testified to the converse of appellees' position; i.e., such detention was *not* necessary to permit follow-up investigation (St. 134).

Appellees cannot have their cake and eat it too. They must not be permitted to callously disregard private rights of freedom, on the pretense of follow-up investigations, and at the same time justify illegal detention during such investigation when their own testimony establishes that reasonable police procedures will not be impaired if the suspect (Notaras) is at liberty on bail.

Viewed in this light, it is apparent that no justification existed for the continued, illegal detention of appellant. Their contention to the contrary at page 16 of their brief falls. Even if appellees' interpretation of *Housman* and *Ulvestad* is correct, its application to the circumstances of the case at bar does not justify their conduct.

Appellees attempt to buttress their case by quoting in their Conclusion (Appellees' Br. p. 17) the very Finding of Fact to which appellant has assigned error!

ARGUMENT OF APPELLANT IN RESPONSE TO APPELLEES' CITATION OF AUTHORITY

1. *State v. Winters*, 39 Wn.2d 545, 236 P.2d 1038 (1951), cited by appellees at page 10-11 of their brief.

Does not say what appellees say it says. Entire point of opinion was whether appellant Winters' confessions were admissible because taken from him (voluntarily) prior to his arraignment on several rape counts. Washington Supreme Court refused to follow rule of *McNabb v. United States*, 318 U.S. 322, 87 L.Ed. 819, 63 S.Ct. 608, as contended for by appellant, and stated:

> "There is no constitutional or statutory provision in the State of Washington having to do with the use of confessions as evidence against a defendant in a criminal trial, except Rem. Rev. State. §2151. *Under the purview of the statute it was not error to admit the confession.*" *Winters*, p. 549. (Emphasis supplied.)

Rem. Rev. Stat. §2151 (now codified as R.C.W. 10.58.030) reads as follows:

> "10.58.030 Confession as evidence. The confession of a defendant made under inducement, with all the circumstances, may be given as evidence against him, except when made under the influence of fear produced by threats;; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony."

At no point in the *Winters* opinion is any discussion of any contention that Winters' civil rights had been violated by virtue of being held incommunicado or without charge prior to arraignment or being taken before a committing magistrate. For ought that the opinion discloses, Winters had been promptly charged with *some* crime promptly upon his arrest.

The opinion simply does not say that in the State of Washington citizens may be held in the city jail

without charge, bail or opportunity to regain their personal freedom.

2. *State v. Thompson*, 58 Wn.2d 598, 364 P.2d 257 (1961), cited by appellees at pp. 11-12, contains langauge, which if taken out of context, superficially supports appellees' position.

In *Thompson*, appellant was held on an open charge for six days while booked on an intoxication charge, during a murder and attempted rape investigation. At the expiration of six days, Thompson was arraigned on a murder charge. Following conviction by jury of second-degree murder, Thompson appealed, alleging, *inter alia*, his confinement on an open charge prior to arraignment to be illegal.

> "We do not agree. Appellant was legally arrested for a felony. He was held on a so-called open charge to permit a reasonable investigation before the filing of an information. The police record or *booking* (sic) is not the charge upon which a defendant goes to trial *and has no particular significance after a formal charge has been lodged. Had he cared to question his confinement prior to filing the information, he could have done so by habeas corpus.* (Emphasis supplied.) After the filing of an information, habeas corpus will not lie." *Thompson*, p. 606.

The key to distinction between the cited case and the case on appeal lies in the emphasized portion of the above quotation. No amount of detention, illegal or otherwise, can affect the validity of a subsequent charge. A defendant is either guilty or not guilty of a criminal charge made. This has no bearing upon detention *prior*

to charge. This is all the Washington Supreme Court was saying.

In the instant case, appellant Notaras makes no contention concerning his confinement subsequent to the charges eventually filed, and appellant never contended that his illegal detention prior to the placing of misdemeanor charges affected his guilt or innocence.

Appellees misconstrue the point of the *Thompson* decision, and this is highlighted by the following quotation from that opinion:

> "Based upon appellant's theory that his confinement prior to the information was illegal, he now contends that his confessions made during that period were inadmissible at the trial on the instant charge." *Thompson*, p. 607.

The only principle that this portion of *Thompson* establishes is that the Washington Supreme Court is refusing to apply the *McNabb* doctrine, where the confinement, if under federal practice, would render confessions inadmissible.

It is important to note that Notaras never made any confession in the instant case. There is no contention that *McNabb*, or Rule 5(a), Fed. R. Crim. Proc., has any application, and appellant never contended that his subsequent trials, on the misdemeanor charges, were invalid because of the detention.

Another point of distinction between appellant Notras and *Thompson* is that Notaras *did* test his illegal confinement by *habeas corpus* (Tr. 10). This is the traditional method of attacking illegal detention, and

the proof of the pudding, as it were, is in the reaction of appellees to the writ. The reaction was immediate formal charge and this, of course, was necessary to justify continued detention.

If the law were as contended by appellees, why was not such a return to the writ made, basing Notaras' detention simply upon suspicion and because the police needed a reasonable time in which to investigate the circumstances? Police never make such returns to *habeas corpus* writs, and the reason is plain: detention without charge and admission to bail is illegal in the State of Washington.

Regardless of the points of distinction between *Thompson* and appellant's position, the language of that opinion is unfortunate. Thompson's attorneys twice tried for hearing by the United States Supreme Court. 370 U.S. 945, 8 L.Ed.2d 811, 82 S.Ct. 1590 (cert. den.); 370 U.S. 855, 9 L.9d.2d 94, 83 S.Ct. (petition for rehearing denied).

Fortunately, the United State Supreme Court did take cognizance of another decision from the State of Washington rendered in the same year, and one in which the Washington State Supreme Court again implied approval of lengthy detention for investigation prior to filing formal charge. *State v. Haynes*, 58 Wn.2d 716, 364 P.2d 935 (1961).

Therein, it appeared that Haynes had been detained 14 hours prior to charge, on the "small book" procedure of the Spokane Police Department. Other points were considered by the Washington State Supreme Court,

and the main thrust of the opinion was that confessions extracted during such period of detention were not *ipso facto* bad as being involuntary.

The United States Supreme Court took a different view, and reversed for a new trial, on the basis of denial of due process of law. *Haynes v. State of Washington*, 373 U.S. 503, 10 L.Ed.2d 513, 83 S.Ct. 1336 (1963).

Commenting upon this "small book" practice, the opinion states, in a footnote at 10 L.Ed.2d 516:

> "Apparently recognizing the questionable nature of such a practice, the Spokane police, we are told, have since abandoned use of the 'small book' and the attendant restrictive practices."

Whether the U. S. Supreme Court was condemning the detention without charge, condemning the incommunicado nature of such detention, or intending to do so if the practice had continued, is not clear. It is clear, however, that the earlier language of *Thompson*, so freely cited by appellees, can no longer stand quite as boldly or clear cut as appellees would argue.

3. Appellees cite *State v. Keating*, 61 Wn.2d 452, 378 P. 2d 703 (1963) at page 13 of their brief in support of the statement that the exclusionary rule of *McNabb v. United States* does not apply to the State of Washington. With this statement of the law, appellant does not argue. The statement is, however, not apposite. Appellant Notaras is *not* trying to have any confession or admission rendered inadmissible by virtue of his illegal detention.

4. The citation by appellees of *State v. Hoffman*,

64 Wn.2d 445, 392 P.2d 337 (1964) at page 13 of their brief also founders on the same point of inappositeness.

The quotation at page 13 of appellees' brief from *Hoffman* shows clearly that the contention was made in an effort to have excluded from trial consideration certain confessions made prior to arraignment. The entire answer to this contention was explained by the court as follows:

> "By contention (a) defendant, in effect, again urges upon us the adoption of a rule of exclusion akin to the 'McNabb rule' . . . (W)e have heretofore refrained from adopting the *McNabb* rule of of exclusion. *Instead*, we have relied upon the ultimate test of 'voluntariness' in determining admissibility of confessions. (Citing cases.)"

It is not necessary for appellant to reply to the citation of *Gallegos v. Nebraska*, 342 U.S. 55, 72 S.Ct. 141, 96 L.Ed. 86, at pages 14-15 of appellees' brief, as it does not apply to any contention made by appellant herein.

ADDITIONAL ARGUMENT IN REPLY TO APPELLEES

Many civil cases in the State of Washington have considered the action of false imprisonment against police authority, even though only two have started from the premise of a lawful arrest, followed by unlawful detention.

In *Neff v. United Pacific Insurance Co.*, 58 Wn.2d 618, 364 P.2d 515 (1961), verdicts were sustained against county sheriffs, where it appeared plaintiffs were arrested on misdemeanor charges committed out of the presence of the sheriff, and unlawfully detained

prior to issuance, service and execution of lawful warrants. (Washington has adopted the rule that arrests based upon misdemeanors committed out of the arresting officer's presence can only be made upon warrant.) The period of unlawful detention *prior* to obtaining and serving the warrants was between fifteen and forty minutes. *id*, 622. Jury awards were affirmed on appeal, "despite the relatively short period of respondents' involuntary confinement prior to the issuance and service of the warrants . . ." *id.* 626.

The *Neff* case, while not controlling herein, contains a persuasive analogy and clearly interprets the status of state law relating to unlawful, involuntary confinement. A detention which is not based upon law is unlawful, no matter what weighty arguments the police may have to support their detention. Personal liberty is too precious and fragile to be made dependent upon the whims of the police. It borders upon speciousness to argue that detention during investigation is better for the suspect than to immediately charge the detainee and subsequently drop the charge. Appellees so argue (Br. of Appellees, p. 15).

The vice of appellees' position and the entire reason for this case to be appealed to this court lies in their statement that the Seattle Police Department had a right to deprive Anthony Notaras of his personal liberty for a "reasonable length of time" while his conduct was being investigated.

Who is to determine what is a reasonable deprivation of liberty? Is this to be left to the discretion of the

police? Is it to be an average of the number of times the police have done this in the past? Granted, the work of the police may be made easier with the suspect in custody, but is this to be the criterion? What is to occur if two policemen differ as to what is a reasonable length of time? What happens when, as happened in this case, the chief of police doesn't even know the suspect is being detained without charge and bail? It is clear, under Washington law, that the chief of police is individually responsible and liable for the conduct of his officers. *Ulvestad v. Dolphin*, 152 Wash. 580, 278 Pac. 681 (1929).

Final note should be taken of two arguments advanced by appellees, one at page 14 of their brief and one at page 16 of their brief.

At page 14, appellees state:

> "Appellant's only support for the rule he urges upon this court is Rule 5 (a) of the Federal Rules of Criminal Procedure, but such rule has no application in the case at hand."

At page 16, appellees state:

> "Appellant mentioned on pages 9 and 10 of his brief that an investigation of a felony can be made while a suspect is at liberty on bail, but it is obvious that an ill-considered charge may not be filed merely for the purpose of fixing bail."

These two statements, considered together, exhibit a rather callous attitude toward fundamental concepts of liberty and the dignity of the individual to his freedom. The statements, in addition, are not correct conceptions of the law.

Appellant does not cite Rule 5(a) FRCP in his brief, nor was it urged to the trial court.

The posture of this case is that appellees labor under the burden of justifying appellant's detention. Housman v. Byrne, supra, clearly states that "without any showing of a necessity of detaining him for that period of time, the detention was unreasonable." p. 562. No facts, except the routine of normal police investigation and follow-up, were submitted by appellees at the trial. Even this routine did not require appellant to be detained. (St. 109, 134.)

Therefore, with appellees not justifying their conduct, appellant's case is obviously supported by case law of the State of Washington and no further citation of authority would have to be made.

If appellees seriously felt that Notaras was detained on an "ill-considered charge," he would have been released. If it was not an "ill-considered charge," then he should have been charged and admitted to bail. Lawful arrest and charges of crime are a hazard of existence. This is the reason probable cause must be established for arrests without warrant. The fact, if such be the case, that the charges are subsequently dropped, or that investigation does not bear out the initial charge, is no justification for continuing the detention without giving the detainee any possibility of regaining his freedom, as no bail con be set. The only method of attacking such detention is via *habeas corpus, and this was done in Notaras' case.* (Tr. 10.)

CONCLUSION

The arguments advanced by appellees are not supported by Washington State or federal authority. The citations of Washington case authority by appellees do not justify appellees' conduct, and *no case of the State of Washington authorizes detention without bail or charge following a lawful arrest.* The State of Washington has refused to adopt the rule of McNabb, but that argument is not before this court.

The decision of the trial judge was based upon a fundamental misconception of the law of the case.

The judgment of dismissal should be reversed, with instructions to enter a judgment for appellant, embodying damages in accord with authority cited in appellant's opening brief. (Br. of Appellant, pp. 18-29.)

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit,

and that, in my opinion, the foregoing brief is in full compliance with tose rules.

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